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No. 655

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting the BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

SAMUEL D. JACKSON,
Attorney General of the State of Indiana,
JOSEPH W. HUTCHINSON,
Deputy Attorney General,
JOSEPH P. MCNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

C. B. Pauley & Co., Inc., Indianapolis

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IN THE

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DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting *the* BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Petitioners,

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action, originally instituted in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and thereafter appealed to the United States Circuit Court of Appeals for the Seventh Circuit, the same being cause No. 7198 in the said Circuit Court of Appeals, was an action to recover taxes collected by the petitioners from the respondent under the Indiana Gross Income Tax Act of 1933 (Chapter 50, Indiana Acts 1933:: Burns' Indiana Statutes Annotated, 1933 Ed., sec. 64-2601 et seq.:: Baldwin's Indiana Statutes, 1934 Ed., sec. 15981 et seq.).

The respondent was successful in the District Court. An appeal was taken by the petitioners resulting in an affirmance of the decision of the District Court (the opinion of the Circuit Court of Appeals for the Seventh Circuit was handed down on July 20, 1940, and the rehearing denied October 5, 1940, and is reported in 114 Fed. (2d) 889). This application for a writ of certiorari is for the purpose of having this Honorable Court review the decision of the Circuit Court of Appeals for the Seventh Circuit.

The Contested Issues Are as Follows

1. Whether the gross receipts derived solely from the enameling by respondent of personal property of another can constitutionally (clause 3, Sec. 8, Art. 1, Federal Constitution) be utilized as a measure of an excise tax assessed by the state in which the enameling activity is completely

carried on, where an agreement exists that the enameler will, prior to the enameling, transport the unenameled property from another state to the enameling plant located in the taxing state and, after processing, return the enameled product to the customer.

2. Whether or not taxes measured by receipts from a local business activity of processing property of another which is separate and distinct from the transportation of the subject personal property processed are prohibited by the terms of the Commerce Clause of the Federal Constitution merely because, in the ordinary course of business, interstate transportation precedes and follows such processing.

The Facts

The facts may, for simplicity, be summarized as follows:

1. *Source of the gross income which was the measure of the tax.* All of the gross receipts which were used as a measure for the taxes assessed, the refund of which is sought in this suit, were received by the respondent at its principal place of business in Frankfort, Indiana, and were derived by the respondent during the second, third, and fourth quarters of the year of 1937, from the enameling of metal parts belonging to stove and refrigerator manufacturers. The enameling process was completely performed at the respondent's enamel-processing plant located at Frankfort, Indiana.

2. *Steps in enameling process of respondent.* The respondent's traveling salesmen originally solicited and negotiated orders from stove and refrigerator manufacturers located in the States of Indiana, Ohio, Michigan,

Wisconsin, and Illinois. The orders forming the basis of the receipts used as the measure of the tax here involved were obtained as aforesaid by the respondent's traveling salesmen, or were repeat orders placed with respondent by customers.

After the respondent had accepted the orders, the stove and refrigerator parts of plain unenameled metal were transported, ordinarily by respondent's trucks, from the plants of the respective customers to the respondent's plant at Frankfort, Indiana, and were there enameled by the respondent. In order to prepare such parts for enameling, all steel parts were first put through a so-called "pickling" bath in six different tanks containing various chemical solutions. Cast iron parts were prepared for the enameling by sand blasting instead of pickling. After the parts were prepared in the pickling department, or sandblasting department, they were put through the respondent's enameling department. The first coat of enamel was a dipped brown coat upon the parts, which were then "fired," that is, baked in large special ovens, seventy feet long, having a temperature of approximately 1,600 degrees Fahrenheit. The parts traveled through such ovens on special conveying equipment. The second coat of enamel was sprayed on with special spraying equipment, and the parts were again fired in said oven. The third and final coat of enamel was applied in the same manner as the second. The enamel itself was a melted granular substance known as frit. The frit was made by respondent in respondent's factory, and was composed of flourspar, cobalt oxide, soda ash, and numerous other ingredients. Upon the completion of the enameling process, there resulted highly polished, enameled articles, and these were trans-

ported, ordinarily by the respondent's trucks, to such customers for assembly by them into their finished product. Respondent thereafter billed such customers *for said enameling*, and remittances on such billing were made by mail to the respondent. There is no evidence that the respondent ever produced the plain unenameled metal parts upon which the enameling process was carried on—in each instance such plain, unenameled metal stampings were the property of the stove or refrigerator manufacturers for whom the enameling was done, and in each instance the parts, when the enameling process was completed, were returned to such stove or refrigerator manufacturers and were by them incorporated as an integral part into stoves or refrigerators so produced by such stove and refrigerator manufacturers.

B

Reasons Relied Upon for the Allowance of the Writ

1. In ruling that "the state was without authority to assess and collect the tax involved" for the reason that the gross receipts utilized as the measure of the tax were receipts from commerce between the states within the meaning of clause 3 of section 8 of Article I of the Constitution of the United States, the Circuit Court of Appeals for the Seventh Circuit decided a question of federal law in a way probably in conflict with applicable decisions of this Court.

See: C.C.A. opinion, R. 48; also brief in support of this petition, p. 11 to 17, infra.

2. In ruling that the respondent's gross income utilized as the measure of this tax was derived not only from the enameling processing which took place within Indiana, but "other services * * * which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of contracts, both in other states," and "included in the services was the transportation by plaintiff of the stove and refrigerator parts from points in other states and the return transportation of such parts by plaintiff after the completion of the enameling process," and that "There was also included, communications by mail, telephone and telegraph by the plaintiff and customers located in other states," the Circuit Court of Appeals for the Seventh Circuit included as the source of the income, items too attenuated to prohibit by virtue of section 8 of Article I of the Federal Constitution the imposition of the tax utilizing such gross receipts as its measure, so that the said Circuit Court of Appeals has decided a question of federal law in a way probably in conflict with the applicable decisions of this court.

See: C.C.A. opinion, R. 46, 47, 48; also brief in support of this petition, p. 11 to 17, infra.

C

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U.S.C.A., Section 347.

D

Opinions Below

The judgment of the District Court is set forth in the Record at page 23. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 114 Fed. (2d) 889, and is also set forth in the Record at pages 44-49.

The judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court, was entered on July 20, 1940, and is set forth at page 50 of the Record, and the petition for a rehearing was denied by the said Circuit Court of Appeals on October 5, 1940 (R. 51).

Your petitioners append hereto their brief in support of this petition, in which each of the foregoing matters is more fully set forth and discussed.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued as of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in the case numbered and entitled on its docket, "No. 7198, *Ingram-Richardson Manufacturing Company of Indiana, Inc.*, Plaintiff-Appellee, *v. Department of Treasury of the State of Indiana, et al.*, Defendants-Appellants,"

and that said judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting the BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

By: SAMUEL D. JACKSON,
Attorney General of the State of Indiana,

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

JOSEPH P. MCNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.....

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting the BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

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v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Court Below

The opinion of the Circuit Court of Appeals for the Seventh Circuit in *Ingram-Richardson Manufacturing Company of Indiana, Inc., v. Department of Treasury of the State of Indiana, et al.*, No. 7198, was rendered on July 20, 1940, and is reported at 114 Fed. (2d) 889, and is also reproduced in the Record at pp. 40-49. Petition for rehearing was denied on October 5, 1940, R. 51.

II

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U.S.C.A., Section 347.

II

Statement of the Case

The Court is respectfully referred to the statement of the case under the heading "A" in the foregoing petition for writ of certiorari (supra, pp. 2 to 5).

IV

Specification of Errors

The Court is respectfully referred to the "Reasons relied upon for the allowance of the writ," which are the errors relied upon, under the heading "B" in the foregoing petition for writ of certiorari (supra, pp. 5 to 6).

V

ARGUMENT

One

The Compensation Was Paid to Respondent for its Service in Enameling the Parts

A. The parties stipulated, and the District Court found, that the receipts used as the measure of this tax were received by the respondent for enameling.

Stipulation, par. 3, p. 2;
F. 9, R. 22.

B. There is no evidence or finding indicating that the measure of the tax "also included * * * the transportation by respondent of the stove and refrigerator parts from points in other states, and the return transportation of such parts by respondent after the completion of the enameling process."

The petitioners have never included in the measure of the tax any gross receipts from transportation across state lines of persons, property or intelligence,—hence any such receipts would be eliminated before any assessment was made and before litigation was instituted. The parties understood and stipulated that the measure of the tax here involved was received by the respondent for *enameling*, and the District Court so found.

Stipulation, par. 3, p. 2;
F. 9, R. 22.

In view of this state of the Record, it is apparent that transportation fees were not included in the measure of this excise.

Two

The Receipts Were Not From an Interstate Activity

A. The Circuit Court opinion appears to hold that the gross income used as the measure of this tax was derived from interstate commerce upon the authority of *Gwin, White & Prince, Inc. v. Henneford, et al.* (1939), 305 U. S. 434. However, it is well to note that the factual situation dealt with by the United States Supreme Court in that case differs materially from the factual situation presently presented. In the *Gwin, White & Prince, Inc.*, case the activity which was being carried on was stated (at p. 436) as being:

> "Appellant undertakes to sell these products at prices fixed by the federation, to obtain their widest possible distribution, to attend to all traffic matters pertaining to shipment and transportation of the fruit, to effect delivery to purchasers, to collect and remit the sales price."

Thus the business activity from which Gwin, White & Prince, Inc., derived its gross receipts was that of distributing and acting as a traffic manager for its clients, so that most of its revenue-producing activities were carried on in states other than the State of Washington.

How different is the situation presented in this instance: Here the income is not derived from acting as a traffic manager, or from negotiating the sale of the finished product to purchasers in other states, nor from collecting

income as agent for a principal from debtors located in other states; the Record shows that the income used as the measure of this tax was derived as compensation for rendering the service of enameling (F. 9, R. 22). The Record does not disclose that the receipts used as the measure of this tax were derived from any other source. Hence, the activities of the taxpayers were quite diverse: That of Gwin, White & Prince, Inc., being similar to that rendered by a company engaged in transportation and in traffic management necessarily performing the service for which payment was made within several different states, while in the present appeal there is no element of traffic management present. All of respondent's gross income utilized as the measure of this tax was derived as payment for the services it rendered wholly within Indiana.

The question presented by the Record and by the briefs filed by both parties is: Were or were not the gross receipts derived from the enameling service alone so closely connected with interstate commerce as to be beyond the power of taxation by the State of Indiana under the Gross Income Tax Act?

B. The Supreme Court of the United States in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 at 439, indicates that the rationale for its decision is:

> "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon

> it, *merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed.*"

In the present instance it is quite apparent that there is no potential risk of the multiple tax burden such as that referred to by the Supreme Court in *Gwin, White & Prince, Inc. v. Henneford, supra.* All that is used as the measure of this tax is the income derived from rendering the service of enameling,—no other income is included in the measure, —and the respondent performs no services in connection with the enameling in other states which would subject it to the taxing jurisdiction of such states with reference to this particular income.

In this respect the present appeal is quite like the decision of the United States Supreme Court in *Western Live Stock v. Bureau of Revenue* (1938), 303 U. S. 250:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question * * * nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce, forbidden merely because, in the ordinary course, such transportation or intercourse is induced or occasioned by the business." (Cited cases.)
>
> "Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or.

> because, as an incident preliminary to printing and publishing the advertisements, the advertisers sent cuts, copy, and the like to appellants."

If "the mere formation of a contract between persons in different states is not within the protection of the commerce clause," then that portion of the opinion of the Circuit Court of Appeals which states:

> "Other services which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of contracts, both in other states" (R. 46-47)

cannot validly represent that the activities specified are sufficient to so alter the factual situation with reference to the performance of the contracts (i. e., the enameling locally), as to remove the state's jurisdiction to tax.

Similarly, the:

> "communications by mail, telephone and telegraph between plaintiff and customers located in other states" (R. 47)

to which the Circuit Court opinion refers must be regarded as being upon the same plane as the activities described in the *Western Live Stock* case:

> "* * * as an incident preliminary to publishing the advertisements, the advertisers sent cuts, copy, and the like to appellants." (303 U. S. 250 at 254.)

It will be recalled that the activities above enumerated were held in the *Western Live Stock* case not to be sufficient to forbid the tax.

The proper test to be applied in the instant appeal then, is whether or not the enameling processing, for which the respondent received the compensation used as the measure of this tax, was itself a transaction in interstate commerce. If the enameling processing were a transaction in commerce between the states, then the respondent would unquestionably be entitled to the exemption granted by Section 6(a) of Chapter 117 of the Indiana Acts of 1937. If the performance of the contract, i. e., the enameling processing, is not of itself a transaction contemplated by the commerce clause, then the respondent is not entitled to the exemption which it seeks.

In the present instance we are dealing with income which was not derived from the sale of the articles transported, nor do we have a tax levied upon the worth after enameling of such transported personal property belonging to another. The measure of the tax included income from a very different source, viz.: it represented the compensation paid to the respondent for rendering the contractual service of enameling, at its Frankfort, Indiana, plant, the stove and refrigerator parts, which at all times were owned by the person who contracted with the respondent to have such enameling done. In view of this situation we must conclude that the tax in question did not use as its measure receipts which the State of Indiana was prohibited from using as a measure of taxation by the provisions of clause 3 of section 8 of Article I of the Constitution of the United States of America.

We think it is abundantly shown in this case that the measure of the tax is derived solely from an intrastate activity, and that the levy using that basis is valid.

On the grounds stated in the petition, and for the reasons more fully set forth in this brief, it is respectfully submitted that a writ of certiorari should be granted and the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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